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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOEING VERTOL COMPANY AND
WILLIAM PLATT,

Petitioners

v.

JOHN F. EDWARDS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether findings of fact and conclusions of law necessary to the disposition of a classwide claim of a pattern and practice of discrimination are binding on a member of the plaintiff class in a separate suit he brings against the same defendant.

2. Whether a member of a certified plaintiff class is entitled to tolling of the statute of limitations on claims of discrimination which he presents in an individual suit after classwide claims of discrimination have been rejected on the merits.

STATEMENT PUPSUANT TO RULE 21(b)

Joseph Wood, an individual, and Local 1069 of the United Automobile Workers were originally named as defendants in this action. Both of them were dropped from the case by stipulation with respondent Edwards on the first day of trial. All other parties in the proceedings below are listed in the caption of the case in this Court.

STATEMENT PURSUANT TO RULE 28.1

This Petition is filed on behalf of Boeing Vertol Company and an individual, William Platt. Boeing Vertol Company is a division of The Boeing Company, a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Boeing Vertol Company and William Platt respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 8, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, reversing the judgment of the District Court, is reported at 717 F.2d 761 and is set forth at pages 1-13 of the Appendix to this Petition. The findings of fact, conclusions of law, and opinion of the United States District Court for the Eastern District of Pennsylvania are unreported and are set forth at pages 14-24 of the Appendix to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1983. This Court has jurisdiction pursuant to 28 U.S.C. §§1254(1) (1976).

APPLICABLE RULES

Rule 23(b)(2), Fed. R. Civ. P.:

> "An action may be maintained as a class action if the prerequisites of [Rule 23(a)] are satisfied, and in addition:
>
> * * *
>
> "The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole."

Rule 23(c)(3), Fed. R. Civ. P.:

> "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. * * *"

STATEMENT OF THE CASE

Respondent Edwards has been an hourly employee of petitioner Boeing Vertol Company since prior to 1965, and he is Black. In 1973, he filed a charge of discrimination with the federal Equal Employment Opportunity Commission alleging racially discriminatory denial of promotion to the position of Supervisor.

Edwards was also an active member of the certified plaintiff classes in a class action, *Croker v. The Boeing Company (Vertol Division)*, which was filed in 1971 and alleged that Boeing Vertol had discriminated against Blacks in all phases of employment, including promotions to Supervisor, in violation of 42 U.S.C. §1981 (1976) and Title VII of the Civil Rights Act of 1964. The classes were certified in 1972. Edwards participated extensively in *Croker* and testified on three occasions.

The *Croker* class action case was bifurcated for trial. The sole purpose of the first phase of trial, which took place in 1975, was to decide whether there had been a pattern and practice of discrimination against the class. Evidence of Edwards' situation was presented in that phase. The class plaintiffs offered Edwards' own testimony and his employment records, in addition to statistical evidence and testimony of certain other class members, to show that members of the class had been victims of racial discrimination in denial of promotions to Supervisor. App. 16.[1] Edwards and another Black employee, both of whom worked in Boeing Vertol's Transportation Department, testified about their own circumstances in an attempt to show discrimination in promotions to Supervisor in the Transportation Department in the period from 1963 through 1975. Boeing Vertol rebutted that evidence by showing, among other things, that Edwards had rejected promotion to the intermediate salaried position of Dispatcher.

At the conclusion of the first phase of the *Croker*

1. Citations to "App." refer to the Appendix to this Petition.

case, the plaintiffs submitted proposed findings of fact and conclusions of law with respect to their claim of a pattern and practice of discrimination. The plaintiffs specifically designated Edwards' testimony and the other evidence pertaining to Edwards as one of several "Illustrative Individual Situations" offered to prove the pattern and practice claim.[2]

On June 20, 1977, the District Court *(Newcomer,* E.D. Pa.) issued its decision on all liability claims in the class action. *Croker v. The Boeing Company (Vertol Division),* 437 F Supp 1138 (1977). Discrediting Edwards' testimony, the District Court expressly found as facts that Edwards "had turned down several promotion offers," "including the job of Dispatcher," and that "any inference of discrimination" had been rebutted as to Edwards. 437 F. Supp. at 1176, 1197.

After considering all evidence of "Illustrative Individual Acts of Discrimination" and the statistical evidence, the District Court also concluded that there had been no pattern or practice of discrimination against the plaintiffs at any time in the period from 1963 through 1975. Pursuant to Rule 23(c)(3) of the Federal Rules of Civil Procedure, the court specifically set forth in its judgment a description of the affected class, and that description included Edwards. 437 F. Supp. at 1198. The plaintiff class appealed.

On December 24, 1980, which was after oral argument but before decision of the *Croker* appeal, Edwards filed the present action against Boeing Vertol and his superintendent pursuant to 42 U.S.C. §1981 and Title VII. He alleged racial discrimination in his nonselection for promotion to Supervisor in the same time period that

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2. Appendix in the Court of Appeals ("CA App."), A589-A590, A596, A617-A618.

had been the subject of the class case.[3] In its answer, Boeing Vertol defended, *inter alia*, on the grounds of *res judicata*, collateral estoppel, and — with respect to claims that arose more than 180 days prior to the 1973 filing of Edwards' charge of discrimination — statutes of limitations.

On September 30, 1981, the *en banc* Court of Appeals affirmed in its entirety the District Court's judgment dismissing the pattern and practice claim. *Croker v. The Boeing Company (Vertol Division)*, 662 F.2d 975 (CA3 1981). None of the District Court's findings or conclusions were set aside. Since Edwards had not been a named plaintiff in the class action and he had not even sought leave to intervene, the Court of Appeals noted in its *Croker* decision that it had no occasion to consider whether, notwithstanding the failure of the class claims, Edwards might be eligible for relief on an individual claim. 662 F.2d at 997-998 and n. 13.

Neither the class nor Edwards sought review by this Court. Instead, Edwards pursued the present action.

In this case, the District Court (*McGlynn*, E.D. Pa.) agreed with Boeing Vertol's submission that the pertinent limitation period should be computed on the basis of Edwards' own complaints of discrimination and therefore reached back to May, 1973 — 180 days before the filing of Edwards' Charge of discrimination — for purposes of Title VII.[4]

After a two-day bench trial in 1982, the District Court concluded that Edwards had failed to establish a case of discrimination and entered judgment against Edwards on all claims. The District Court found it unnecessary to decide the merits of Boeing Vertol's

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3. Edwards' complaint reached five years after the class case, but there were no additional Supervisor promotions in that period. App. 21.

4. For purposes of 42 U.S.C. §1981, the limitation period is computed on the basis of Edwards' December, 1980 complaint and could not reach as far back as the Title VII period.

defenses of *res judicata* and collateral estoppel, and therefore had no occasion to make detailed findings of fact concerning the *Croker* plaintiffs' use of Edwards' testimony to present an "Illustrative Individual Situation" in support of their class claims. The District Court did, however, expressly find as a fact — a finding that has never been challenged or set aside — that "*The Croker plaintiffs offered Edwards' testimony in an attempt to prove class claims of discrimination.*" App. 16, emphasis supplied.

The District Court also found as a fact that Edwards' testimony in crucial respects "was not credible." App. 19. Thus, without reaching the issues of *res judicata* and collateral estoppel, two different seasoned triers of fact have independently determined that Edwards' race was not a factor in the employment decisions of which he complains.

On appeal, however, the Third Circuit (*Gibbons*, Hunter, Mansmann [W.D. Pa.]) reversed. The panel held that the District Court should have given Edwards the benefit of tolling of the statute of limitations for the entire duration of the proceedings in the *Croker* class action and should therefore have considered promotion decisions reaching back to 1965.

Then despite having allowed Edwards that benefit and without giving the District Court an opportunity to deal with the issues of collateral estoppel and *res judicata*, the panel also held that the burden of a defense of collateral estoppel or *res judicata* could not be imposed upon Edwards. The panel did not disturb the District Court's unchallenged finding of fact that Edwards' testimony in *Croker* had been offered in order to prove the pattern and practice claims. Instead, the writer of the panel opinion based his ruling on his own supposition that "Edwards never had an opportunity for appellate review of the decision upon which Boeing Vertol relies for collateral estoppel." App. 13.

REASONS FOR GRANTING THE WRIT

I. *RES JUDICATA* AND COLLATERAL ESTOPPEL

A. *This Court's Decision Of A Pending Case In Which Review Has Been Granted Could Require Reversal Or Modification Of The Judgment In This Case*

The first issue in the present case is whether findings and conclusions necessary to resolve class claims are binding on a member of the class. That issue falls well within the purview of possible dispositions of a case in which this Court has already granted review. *Cooper v. Federal Reserve Bank of Richmond*, No. 83-185, 52 U.S.L.W. 3342 (U.S. Oct. 31, 1983). In *Cooper*, a panel of the Court of Appeals for the Fourth Circuit unanimously held that "The rule for determining when a judicial determination in a properly certified class action will bind a class member, not opting out after notice, in asserting thereafter an individual claim within the range of charges determined in the class suit" is that such a class member "is precluded by *res judicata* from maintaining subsequently an individual action claiming discrimination in a particular ruled on in the class action." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 674 (CA4 1983). *Accord, Kemp v. Birmingham News Co.*, 608 F.2d 1049 (CA5 1979); *Byr. v. Prudential Ins. Co.*, 30 FEP Cases 304, 30 CCH EPD ¶33,195 (S.D. Tex. 1982).

The decision below in the present case is directly contrary to the Fourth Circuit's decision. Edwards indisputably claimed discrimination in "particular[s] ruled on in the class action" — promotions to Supervisor in the period beginning in 1965, and Edwards' own nonpromotion in particular. Boeing Vertol called the Fourth Circuit decision to the attention of the panel below in its brief and at oral argument. Edwards attacked

that decision as an "explicit refutation" of Third Circuit law.[5]

The writer of the Third Circuit opinion, who had dissented vigorously from the *en banc* decision against the class in *Croker*, ignored the Fourth Circuit's decision. Instead, he relied on his own *sua sponte* assertion that Edwards had not had an opportunity for appellate review in *Croker*. That assertion, however, is transparently unfounded as a matter of law and as a matter of fact. It was undisputed that Edwards had been a member of the class in *Croker*, that Edwards could have intervened for purposes of obtaining review (*United Airlines, Inc. v. McDonald*, 432 U.S. 385 [1974]), that the *class* had a full opportunity for appellate review, and that on appeal in *Croker* the class specifically sought without success to have the Court of Appeals set aside the findings and conclusions mentioning Edwards. *E.g.*, App. 15; Tr. of CA Oral Arg., at 24; 662 F.2d at 993-95.[6] Beyond that, the panel's assertion about events in *Croker* far exceeds the power of a Court of Appeals, the function of which is to review a record and not to make *sua sponte* determinations of contested facts.[7]

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5. Reply Brief for Appellant Edwards in the Court of Appeals, at 11.

6. In the decision below, the Court of Appeals also held that if there is to be a new trial (*i.e.*, if there is no *res judicata* or collateral estoppel bar), the District Court should allow trial by jury on Edwards' claim pursuant to 42 U.S.C. §1981, even though the first demand for jury trial came eleven months after joinder of issue on Edwards' claim of intentional racial discrimination. App. 5-7. Although the undersigned petitioners believe that ruling was also erroneous, they do not contend that the issue merits plenary review by this Court.

7. The panel below was aware that the District Court had reserved judgment on the defenses of *res judicata* and collateral estoppel. The District Court's opinion contains an explicit reservation (App. 23), and counsel for Edwards represented at oral argument that no findings and conclusions had been made on the issue. Tr. of CA Oral Arg., at 51.

If this Court were to affirm in *Cooper*, the judgment would have to be reversed in the present case. The rule applied by the Fourth Circuit in *Cooper* would bar Edwards' claim by virtue of the *res judicata* effect of the class action judgment, without even taking into account the specific findings and conclusions mentioning Edwards. But even if the Court should reverse or vacate in *Cooper*, it would still be important to resolve the additional problem of collateral estoppel or issue preclusion that is presented in this case: whether a class member with notice who actively casts his lot with the class is bound by findings and conclusions necessarily entered in support of the judgment against the class.

B. *The Decision Below On The Issues Of* Res Judicata *And Collateral Estoppel Raises Significant And Recurring Problems Concerning The Judicial Administration Of Cases Brought Pursuant To Rule 23 Of The Federal Rules Of Civil Procedure*

In the decision below, the panel has announced a striking departure from long-accepted principles of *res judicata* and collateral estoppel in class actions. By holding that a class member is not bound by the findings and conclusions entered in order to decide the *class* claims unless he actually takes the necessary action to obtain appellate review individually (here, to file for intervention under *United Airlines v. McDonald*), the panel has cut the heart out of the policies of efficiency and judicial economy that are embodied in Rule 23. Under this new Third Circuit rule, *res judicata* and collateral estoppel become a one-way street for the benefit of the plaintiff class only.

The effect in the case at hand is wasteful of judicial resources and extremely unfair to prevailing defendants, without advancing any substantial public policy. Decisions of issues that were actively litigated in order to resolve class claims of discrimination, resolving the merits of contentions that a particular individual who actively

cast his lot with the class had been an illustrative individual situation of discrimination, have been held not to be binding on that very individual. That is directly contrary to the policies emphasized by this Court in explaining the important 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure:

> "A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interes.s. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation — the potential for so-called 'one-way intervention' — aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effects of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this percived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments."

American Pipe & Construction Co. v. Utah, 414 U.S. 538, 547 (1974).

The Third Circuit's holding on this issue will necessarily have immediate and widespread effects, not only in the area of employment discrimination, but in other class action cases.[8] This problem will be aggravated by

8. Precisely the same issue was presented in *Byrd v. Prudential Ins. Co., supra*, but following Fifth Circuit precedent which conflicts with the Third Circuit rule, the court in *Byrd* held that the individual claims were barred by *res judicata* in light of the judgment against the class.

the fact that the Court of Appeals, in a second and distinct ruling in the present case, expanded prior class action tolling decisions and allowed Edwards full *American Pipe* tolling of the statute of limitations — over an eighteen year period — even though he was a member of a certified class with notice. See pp. 12-16, below. If the Third Circuit's approach is be the rule, it should be so only after scrutiny and approval by this Court.

C. *This Case Presents A Better Vehicle Than The Previously Granted Case For The Court To Decide The Issues Of* Res Judicata *And Collateral Estoppel*

One option open to the Court would, of course, be to hold this case pending decision of *Cooper*. It is submitted, however, that substitution of this case for *Cooper* (*i.e.*, scheduling oral argument in the present case and deferring argument in *Cooper*) or consolidation with argument in tandem would be preferable for two reasons.

First, unlike *Cooper*, the present case permits the Court to consider not only the *res judicata* effect of a *judgment* against the class, but also the collateral estoppel effect of particular findings and conclusions entered to resolve *issues* actually litigated by the class. That can afford the Court a better opportunity to delineate its holding on the issue as stated in *Cooper*. For example, in this case but not in *Cooper*, the Court would have available to it the option of holding that a class action judgment does not in and of itself preclude all individual claims, but that determinations of issues in the class case are conclusive on all class members who cast their lot with the class.

Second, the present case, unlike *Cooper*, presents a distinct class action statute of limitations issue on which there is also a conflict in the Circuits. See Part II, below.

II. STATUTE OF LIMITATIONS

A. *The Decision On The Statute Of Limitations Issue Directly Conflicts With A Decision Of Another Court Of Appeals*

Although he seeks to disassociate himself from the *Croker* class action when it comes to *res judicata* and collateral estoppel, Edwards at the same time seeks the full benefit of tolling of the statute of limitations which this Court has previously permitted for putative class members in cases in which class certification is denied. Again overruling the District Court, the panel below held that a member of a plaintiff class who has notice that the case has been certified to proceed as a class action, who participates actively in the class action, and who pursues an individual claim after rejection of the class claims on the merits is entitled to tolling of the statute of limitations for the full duration of the class action.

In *Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 461 F. Supp. 999, 1012 (D.D.C. 1978), *aff'd in pertinent part*, 650 F.2d 342, 346 n.7 (CADC 1980), *cert. denied*, 452 U.S. 954 (1981), after careful analysis of the issue, the District Court *(Parker)* held that members of a certified plaintiff class do not qualify for such tolling. 461 F. Supp. at 1010-13. Affirming on point, the Court of Appeals for the District of Columbia Circuit (Robinson, *Mikva*, Flannery [D.D.C.]) held that since "certification of the class was *granted*, not denied," and "no intervention was ever attempted," the plaintiffs had demonstrably "preferred to pursue their own case rather than seek class relief," and accordingly that class action tolling would be entirely inappropriate. 650 F.2d at 346 n.7 (emphasis supplied). The holding in *Wachovia* comes from a Court of Appeals that has always taken an expansive approach to class action tolling in situations of *denial* of class certification,[9] and it is squarely in conflict with the decision below in the present case. *Wachovia* was repeatedly called to the at-

9. *See, e.g., McCarthy v. Kleindienst*, 562 F.2d 1269, 1271-75 (CADC 1977).

tention of the panel below in the briefs and at oral argument, but the panel did not even attempt to deal with that case.

The Third Circuit's ruling on the tolling issue is very broad in its application. It applies generally to all Rule 23 class actions, each of which involves many parties and major stakes and many of which present forum-shopping possibilities. With the Third Circuit's departure from the holding of the District of Columbia Circuit, the Third Circuit becomes a uniquely hospitable forum for plaintiff class litigants. If allowed to stand, that will significantly affect the results of class litigation.

B. *The Decision On The Statute Of Limitations Issue Represents A Major Expansion Of And Departure From This Court's Prior Decisions*

In *American Pipe & Construction Co. v. Utah*, this Court held that when a purported class action is determined to be inappropriate for class action status, "the commencement of the original class suit tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 553. The Court identified two central policy reasons for this holding. The first is fairness to any plaintiffs who may have refrained from taking action individually because they expected the case to proceed as a class suit. 414 U.S. at 551-52. The second is the considerations of judicial efficiency that are served by eliminating the need to make protective filings before the ruling on class certification. 414 U.S. at 553-54.

Last term, this Court held that *American Pipe* tolling is available to members of a purported class who, promptly after denial of class certification, file separate individual suits instead of moving to intervene in the class action. *Crown Cork & Seal Co. v. Parker*, ____U.S.____, ____S.Ct.____, 76 L.Ed.2d 628 (1983). Like *American Pipe*, however, that decision was ex-

pressly limited to cases in which class certification has been denied and in which the plaintiff has acted promptly after the decision on class certification. In *Crown Cork*, this Court took pains not to cast any doubt on the District of Columbia Circuit's holding in *Wachovia* with respect to cases in which class certification has been granted. The Court repeatedly stressed the denial of certification, and *Wachovia* was carefully excluded from the list of cases from other circuits, all involving denial of class certification, which this Court declared to have been overruled by *Crown Cork*. 76 L.Ed. 2d at 633 n.2.[10]

The decision of the Third Circuit in the present case is an utterly unprecedented incursion upon legislatively enacted statutes of repose and a radical departure from the *American Pipe-Crown Cork* line of cases, and it has at least three critical flaws.

First, it permits a member of a certified class to have more than one bite at the apple (three bites, in the present case). After the decision of the merits of the class claims, the class member may be permitted to move to intervene in the class case at that point if the class claims are successful. But in the Third Circuit, if the class claims are unsuccessful every individual class member may still bring an individual suit — years after the grant of class certification, regardless of how actively he participated in the class case, and regardless of how vigorously his own situation was pressed upon the court as an "Illustrative Individual Situation" in the class case — *and* he will still have the benefit of tolling of the statute of limitations back to day one of the class action limitation period. Under that approach, which permits essentially the same "one-way intervention" which this

10. *Wachovia* was expressly called to this Court's attention, *e.g.*, Brief for Petitioner at 9, *Crown Cork & Seal Co., Inc. v. Parker*, No. 82-118 (U.S. filed Dec. 22, 1982), and was discussed in the appellate decisions cited in *Crown Cork*. *E.g.*, *Pavlak v. Church*, 681 F.2d 617, 621 (CA9 1982).

Court condemned in *American Pipe*, 414 U.S. at 547, a class action serves the "efficiency and economy which is a principal purpose of the procedure"[11] only if the class wins.

Second, the new Third Circuit rule permits virtually unlimited delays. Under that rule, the class member may wait for many years after a grant of class certification before taking any action. In the present case, for example, the plaintiff now conveniently asserts (contradicting his active involvement in the class case) that he preferred to pursue an individual claim rather than a class claim. But the individual suit was brought eight years and four months after the 1972 decision on class certification.

Third, the Third Circuit's rule produces intolerable prejudice to defendants. Notice of the pendency of a claim of a pattern and practice of discrimination does not provide adequate notice to the defendant with respect to individual claims of class members, such as Edwards, who are not named plaintiffs in the class case and who choose not to intervene. *E.g., Dickerson v. United States Steel Corp.*, 582 F.2d 827, 832 (CA3 1978). Consistent with that principle and with this Court's warnings in *American Pipe*, it is a matter of record that in the eighteen-year limitation period reached by the Third Circuit's rule in this case, "evidence has been lost, memories have faded, and witnesses have disappeared."[12] *American Pipe*, 414 U.S. at 554. The class action de-

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11. *American Pipe*, 414 U.S. at 553.

12. At least two supervisors in Edwards' department who had pertinent information have died, one in 1975 and the other in the late 1970s. Court of Appeals Appendix at A288 and A453-454; *see id.* at A118, A267-270, A342. Also, at the 1982 trial in this case, Boeing Vertol's key witness, petitioner William Platt, was understandably unable to recall some of the material events of the 1960s and 1970s which he had recalled in 1975 and to which he had testified in successfully in rebutting Edwards' testimony at the class action trial. *Id.* at A306-309.

fendant in the Third Circuit is doubly prejudiced because the decision against the class has little or no *res judicata* or collateral estoppel effect. See Part I, above.

By his own belated and convenient admission, Edwards, like the plaintiffs in *Wachovia*, "preferred to pursue [his] own case rather than seek class relief." *See* 650 F.2d at 346 n.7. In such circumstances, he should not be permitted the benefit of class action tolling. The proper approach is that taken by the District of Columbia Circuit and by the District Court below — looking to the dates of Edwards' own complaints and allowing claims as far back as 1973. The policies of repose embodied in statutes of limitations,[13] the policies mandated by Congress in Title VII of the Civil Rights Act of 1964 to "encourage the prompt processing of all charges of discrimination" and to "protect employers from the burden of defending claims arising from employment decisions long past,"[14] and the policies that justify tolling in the *American Pipe* and *Crown Cork* situations in which class certification has been denied[15] are all seriously undermined by the decision of the Third Circuit in this case. This Court should review the correctness of the Third Circuit's rejection of the holdings of the District Court and the District of Columbia Circuit.

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13. *See, e.g., Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

14. *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1981); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

15. See p. 13, above.

CONCLUSION

In straining to allow Edwards yet a third trial of his very stale claims, the Third Circuit has announced two distinct holdings that seriously undermine the policies of the class action rules. A writ of certiorari should issue to review that judgment. It is submitted that this case should be substituted for No. 83-185, *Cooper v. Federal Reserve Bank of Richmond*, or consolidated with *Cooper* for argument in tandem.

Respectfully submitted,

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November, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1826

JOHN F. EDWARDS,

Appellant

v.

BOEING VERTOL COMPANY, WILLIAM PLATT, HOWARD STUVERUDE, JOSEPH WOOD, LOCAL 1069 U.A.W.

(D.C. Civil No. 80-4955)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: August 5, 1983

Before: GIBBONS and HUNTER, *Circuit Judges* and MANSMANN, *District Judge**

(Opinion Filed September 8, 1983)

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*Hon. Carol Los Mansmann, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

John F. Edwards, an employee of Boeing Vertol Company, appeals from a judgment in favor of the defendants in his action charging that he was discriminated against in employment because of his race. He contends that the trial court erred in denying his motion for discovery with respect to events occurring prior to 1973, in applying the statute of limitations, and in trying the case without a jury. The defendants contend that the action should not have been tried at all because it is barred by res judicata or collateral estoppel. We reverse and remand for a new trial.

I.

Edwards has been employed at Boeing Vertol since 1952, primarily in the Transportation Department as a bus driver. Edwards contends that he has been interested in a promotion to a supervisory position since the early 1960's and has demonstrated that interest by maintaining an above standard work record, and by attending a pre-supervisory training course offered by his employer in 1966. Prior to 1973 there was no formal procedure by which employees could bid on supervisory vacancies. Since the 1960's supervisors in the Transportation Department have been selected by William Platt, with input from other managers. According to Edwards, between 1965 and 1973 at least ten persons, all white, were appointed as supervisors in that department. To Edwards' knowledge, only three of these persons had prior supervisor experience.

On September 2, 1971, a class action was filed in the Eastern District of Pennsylvania by several Boeing Vertol employees on behalf of all black employees, alleging a company-wide pattern or practice of racial discrimination on or after September 2, 1965, in violation of

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) and the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§1981, 1985. Edwards was not a named plaintiff. On November 21, 1973 he filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination in his failure to receive a promotion. In 1974 Edwards testified as a witness in the pending class action, and in 1975 he supplemented his EEOC charge to include allegations of retaliation for that testimony. On November 19, 1980 Edwards received from EEOC a notice of his right to sue. On December 12, 1980 he filed a handwritten pro se complaint which commenced this action. The inartful complaint, in letter form, addressed to the Clerk of the United States District Court for the Eastern District of Pennsylvania, alleges that Boeing Vertol discriminated against him in an ongoing manner. It alleges:

> Enclosed is a "right to sue" letter from E.E.O.C. along with my charge. I cannot afford counsel at this time, and am requesting this District Court of appoint in my behalf under the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) suitable representation.

There is no mention in the complaint of any other statute. Thus a fair reading of it is that Edwards relied originally only upon Title VII. The pro se complaint does not contain a demand for jury trial. The pro se complaint was served on the defendants, and they filed answers in January of 1981.

On December 28, 1981 counsel entered an appearance on Edwards' behalf, and immediately moved for leave to file an amended complaint. A copy of the proposed amended complaint was served with the notice of motion, and it contained a demand for a jury trial. The amended complaint added a charge under 42 U.S.C. §§1981 and 1985 and a demand for money damage. The memorandum of law in support of the motion pointed

out that when a claim for legal relief was joined with a claim for the equitable relief available under Title VII, the plaintiff was entitled to a jury trial. The proposed amended complaint added no new parties and made no new factual allegations.

The defendants opposed the motion for leave to file an amended complaint, but filed no affidavits showing that they would be prejudiced in any manner if it were to be granted. The defendants also refused to answer interrogatories with respect to any period prior to May 20, 1973. Counsel for Edwards promptly moved for an order to compel discovery for the period back to September 2, 1965, contending that this date was the governing limitations period.

The trial date had, on December 28, 1981, been fixed for Monday, April 5, 1982. That trial listing was made the same date Edwards' counsel entered an appearance, at a time when his request for appointment of counsel under 42 U.S.C. 2000e-5(f)(1), set forth in his initial pro se pleading, had not yet been acted upon. On Friday, April 2, 1982, the trial court ruled on the pending motions for leave to file an amended complaint and to compel discovery. The court granted the motion for leave to file an amended complaint. It denied the motion for a jury trial as untimely. It denied the motion to compel discovery. Although the trial court did not prepare an opinion, colloquy in the record makes clear that the discovery ruling amounted to a pretrial ruling that the statute of limitations barred consideration of evidence of discrimination occurring prior to May 20, 1973. Counsel moved for reconsideration of the discovery ruling, or in the alternative, for a certification under 28 U.S.C. §1292(b) that the limitations question involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal would materially advance the ultimate termination of the action. These motions were denied.

The trial commenced as scheduled on April 5, 1982. The court limited Edwards' proofs to acts of discrimination occurring after May 25, 1973. On November 30, 1982 the trial court filed finding of fact and conclusions of law. The court found that in the period after May 25, 1973 race was not a factor in Edwards' failure to receive a promotion. Since he had not established a prima facie case the court found it unnecessary to address Boeing Vertol's other defenses. Judgment was entered in favor of defendants, and this appeal followed.

II.

Edwards contends that the trial court erred in striking his jury trial demand as untimely. Boeing Vertol does not dispute that a party requesting compensatory or punitive damages under 42 U.S.C. † 1981, or other legal relief, has a right to a jury trial. *E.g., Curtis v. Loether*, 415 U.S. 189, 194 (1974); *Moore v. Sun Oil Co.*, 636 F.2d 154 (6th Cir. 1980). This seventh amendment right applies even when legal claims are based upon the same facts which support equitable claims. 9 C. Wright and A. Miller, *Federal Practice and Procedure* §2306 (1971). Moreover it is well settled that the relief available under Title VII is equitable in nature. *Richerson v. Jones*, 551 F.2d 918, 926-28 (3d Cir. 1977).

A demand for a jury trial of any issue triable of right by a jury must be served on other parties "not later than 10 days after the service of the last pleading directed to such issue." Fed. R. Civ. P. 38(b). In this case the demand for jury trial was included in the proposed amended complaint, attached to the motion for leave to file an amended complaint, and served with that motion on December 28, 1981. Thus if the motion for leave to file an amended complaint was the first pleading presenting an issue triable by jury, the demand was timely.

Relying on *Walton v. Eaton Corp.*, 563 F.2d 66 (3d Cir. 1977) (en banc), Boeing Vertol contends that the

time period in Rule 38(b) ran not from the time a section 1981 claim was pleaded, but from the date of service of the original complaint. In *Walton* an employment discrimination plaintiff filed a class action complaint alleging causes of action under Title VII and under sections 1981 and 1983. The complaint expressly waived trial by jury. It sought declaratory and injunctive relief and punitive damages. Thus it was a complaint on which, had it been timely requested, jury trial would have been afforded. Some time later the plaintiff filed a separate complaint alleging the same discrimination, but seeking compensatory damages for emotional and mental injury. The second complaint requested a jury trial. This court, treating the subsequently filed complaint as an amendment to the original, held that unless the amendment raised a new issue, the earlier waiver of jury trial was binding.

The governing precedent for the instant case, however, is not *Walton*, but *Canister Co. v. Leahy*, 191 F.2d 255 (3d Cir.), *cert. denied*, 342 U.S. 893 (1951). That case holds that when the plaintiff's complaint states a cause of action for equitable relief only, its filing will not be deemed to be a waiver of the right to jury trial with respect to an amendment which seeks legal relief. As Judge Biggs points out in *Canister*, this ruling is entirely consistent with the language of Rule 38(b), which provides that the demand shall be served within ten days of service of the last pleading directed to a legal issue. *Id.* at 257. The *Canister* rule was recently applied in a context identical with that presented here, a Title VII complaint and an amendment pleading a section 1981 cause of action. *Clarke v. American Cyanamid Co.*, 24 Fair Empl. Pract. Cas. (BNA) 873 (D.N.J. 1980), *aff'd without opinion*, 30 Emp. Prac. Dec. (CCH) ¶ 33,178 (3d Cir. 1982).

Boeing Vertol urges that we should construe Edwards' pro se complaint as if it had requested relief under sections 1981 and 1985, and thereby place it within the *Walton* waiver rule rather than within *Canister*. En-

tirely apart, however, from the general principle of generosity with respect to our reading of pro se pleadings, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), it is clear that the document cannot be reasonably construed as seeking relief other than that available under Title VII. The pleading contains no demand for either compensatory or punitive damages, and it mentions no other statute.

The trial court erred, therefore, in striking the jury trial demand as untimely, and a new trial is required unless, as Boeing Vertol contends, there is another basis for affirmance.

III.

Edwards urges that entirely aside from the jury trial issue a new trial is required because the trial court limited discovery and evidence to acts of discrimination occuring after May 25, 1983, one hundred eighty days before he filed a charge with the EEOC. His theory, which the trial court rejected, was that while the class action was pending against Boeing Vertol, seeking company-wide relief, the statute of limitations was tolled for all class members. Since the class action was filed on September 2, 1971, and this action was filed before the class action was finally terminated, Edwards could, if it tolled the statute of limitations as to him, rely under Title VII on all acts of discrimination occurring after March 23, 1968, and under section 1981 on all acts of discrimination occurring after September 2, 1965. 42 U.S.C. §2000e-5(e); 42 Pa. C.S.A. §5527.

As noted above, Edwards was not a named party in the class action. *See Croker v. Boeing Co.*, 437 F. Supp. 1138, 1176 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975, 997 (3d Cir. 1981) (en banc). In that action, at the end of the liability stage of a bifurcated trial, the issue of Boeing Vertol's liability for a pattern or practice of racial discrimination was decided in its favor. The court held that the

class plaintiffs had failed to prove that the employer engaged in a pattern or practice of discrimination. 437 F. Supp. at 1192. The court then turned to the claims of individual named plaintiffs, noting that the finding in favor of Boeing Vertol on the pattern or practice charge did not preclude a finding in favor of individual victims of discrimination. 437 F. Supp. at 1192-98. The court decided some of those claims in favor of the individual named plaintiffs. However, faced with the holding of this court in *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), it dismissed the claims of all class members who were not parties. On appeal this court addressed the question whether the claims of individual class members who were not parties should have been litigated. We observed:

> In *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), this court held:
>
> An individual class member, who has not presented any evidence of having satisfied the jurisdictional prerequisites in his own name and who is not a named plaintiff in the class action, *may not* be entitled to relief for an individual claim of discrimination, if the class-wide claim encompassing his individual claim on that issue is dismissed.
>
> *Id.* at 834 (emphasis in original). Although the employees do not challenge the holding in *Dickerson*, they attempt to distinguish that case on its facts. We believe, however, that *Dickerson* pronounced a clear rule of law applicable to this case. The appropriate means by which unsuccessful class members may adjudicate their individual claims is by motion for intervention under Federal Rule of Civil Procedure 24(b), after which the district court, in its discretion and considering the possibility of undue delay and prejudice, may grant the motion. We affirm the district court's holding that the class-member

witnesses, who were not named plaintiffs in this unsuccessful class action and who did not seek to intervene in this action, were not entitled to individual relief.[12]

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12. Because of our disposition of this issue, we need not address the district court's rejection, on the merits, of class-member John Edwards' claim of discriminatory denial of promotion.

662 F.2d at 997-98. We also affirmed the dismissal of the pattern or practice charge. *Id.* at 997. Thus it is clear that until September 30, 1981, when the appeal in the *Croker* case was decided, a class action was pending which sought relief for the class of which Edwards was a member.

The pendency of that action requires that we consider the application to this case of two Supreme Court cases. The first is *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). In that case, eleven days before the statute of limitations would have run on an action for violation of the Sherman Act, the State of Utah filed a class action on behalf of municipalities in the state who were users of pipe purchased from the defendants. Thereafter on motions of the defendants the district court ruled that the action could not be maintained as a class action. Thereafter individual municipalities which were putative class members moved to intervene. The court held unanimously that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties within the meaning of Fed. R. Civ. P. 23 had the suit been permitted to continue as a class action. A contrary rule, the court observed, would encourage the proliferation of filings by individual class members, and defeat the economy and efficiency purposes behind the Rule 23 class action procedure. *Id.* at 553.

More recently, in *Crown, Cork & Seal Co. v. Parker*, 51 U.S.L.W. 4746 (U.S. June 13, 1983), the Court reiterated the *American Pipe* holding. In *Crown, Cork & Seal* the plaintiff Parker received a notice of right to sue letter from the EEOC during the pendency of a class action on behalf of a class of which he was a member. Despite the 90 day time limit in 42 U.S.C. §2000e-5(e), Parker waited until the resolution of the class action. Almost two years later class certification was denied, and shortly thereafter he filed an individual suit. Holding that the suit was timely the court observed:

> The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied. Much the same inefficiencies would ensue if *American Pipe's* tolling rule were limited to permitting putative class members to intervene after the denial of class certification. There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene. The forum in which the class action is pending might be an inconvenient one, for example, or the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available. Moreover, permission to intervene might be refused for reasons wholly unrelated to the merits of the claim. . . . A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a

> needless multiplicity of actions — precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

Id. at 4748 (footnote omitted). The principles informing the *American Pipe* and *Crown, Cork & Seal* decisions are equally applicable to his case. Boeing Vertol had notice of charges both of a pattern or practice and of individual discrimination. Edwards was a witness in the class action. He was not sleeping on his rights. Even though the scope of relief in an individual claim might be different, if the class action were to succeed he might receive all the relief he desired. Thus he was entitled to rely on the pendency of that action so long as it was pending. Any other rule would needlessly proliferate separate lawsuits.

Boeing Vertol would have us distinguish *American Pipe* and *Crown, Cork & Seal* because in this case, unlike them, a class was certified and the claims tried. Such a distinction would make no sense. Reliance on the pendency of a certified class action is more reasonable than the reliance on an uncertified class action which those cases approve. The certification of the class should discourage, rather than encourage, the proliferation of filings of individual actions. The distinction which is urged on us would produce the very evil which the Court sought to avoid in *American Pipe* and *Crown, Cork & Seal*.[1] Consistency with the policies reiterated in *Crown, Cork & Seal* requires that the tolling of the statute of limitations continue until a final adverse determi-

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1. *Cf.* United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 n.15 (1977) ("A rule requiring putative class members who seek only to appeal from an order denying class certification to move to intervene shortly after entry of that order would serve no purpose . . . . [S]uch a rule would induce putative class members to file protective motions to guard against the possibility that the named representatives might not appeal from an adverse class determination").

nation of class claims. That occurred in this case on September 30, 1981.

Since Edwards filed his complaint before the *Croker* case was finally determined in favor of Boeing Vertol, he should be able to prove any acts of discrimination against him which he could have proved had he been a named party in that action. Thus the trial court erred in limiting both discovery and proof to the period after May 25, 1973. This is a separate ground for a new trial unless, as Boeing contends, there is another ground for affirmance.

IV.

The other ground for affirmance on which Boeing Vertol relies is the judgment in its favor in the *Croker* class action.

It contends, first, that as a member of the class who did not opt out Edwards is barred, as a matter of *res judicata*, by that judgment. We may assume this to be the case. But that judgment determined no more than that the class representatives had failed to prove a company-wide pattern or practice of discrimination. Edwards is not, however, attempting to relitigate what was finally determined in the class action. The trial court explicitly held that its decision in favor of the employer was not a determination that individual employees had not been victims of discrimination. 437 F. Supp. at 1192. Only that holding was affirmed by this court. 662 F.2d at 997. The class action judgment is not a former adjudication.

Alternatively Boeing Vertol urges that principles of collateral estoppel bar Edwards' individual claim because it was actually litigated in the trial of the class action. The district court, prior to our decision in *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), did discuss Edwards' individual claim. 437 F. Supp. at 1176, 1197. However this court held on appeal

that under the *Dickerson* rule the trial court lacked jurisdiction to adjudicate individual claims. Edwards' claim was named specifically. 662 F. 2d at 998 n.12. Thus Edwards never had an opportunity for appellate review of the decision upon which Boeing Vertol relies for collateral estoppel. Relitigation of an issue in a subsequent action, even between parties, is not precluded when the party against whom preclusion is sought could not, as a matter of law, obtain review of the judgment in the initial action. Restatement (Second) of Judgments, §28(1) (1982). Thus we reject Boeing Vertol's collateral estoppel contention. Indeed, given the finality of this court's judgment in *Croker v. Boeing Co.*, 662 F.2d 975, 998 (3d Cir. 1981), on the applicability of *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), to Edwards' individual claim, any collateral estoppel in the case runs in his favor on that issue and against Boeing Vertol.

V.

Thus we hold that the trial court did not err in undertaking to try the case despite the judgment in *Croker v. Boeing Co., supra*, but that it erred (1) in striking the demand for a jury trial, and (2) in limiting discovery and evidence to the period after May 20, 1973. Thus the judgment in favor of Boeing Vertol will be reversed and the case remanded for a new trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John F. Edwards	:	Civil Action
v.	:	
Boeing Vertol Company, et al.	:	No. 80-4955
McGlynn, J.	:	November 29, 1982

This is an employment discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 and the Civil Rights Act of 1866, 42 U.S.C. §1981.

Upon consideration of the evidence presented at a two day bench trial and after consideration of the briefs and arguments of counsel, the court makes the following

FINDINGS OF FACT

1. Plaintiff, John F. Edwards, who is Black, has been employed in the Transportation Department of the defendant Boeing Vertol Company or its predecessors since 1952. Edwards is a member of Local 1069 of the United Automobile, Aerospace, and Agricultural Implement Workers of America, and that union in his exclusive bargaining representative with respect to terms and conditions of employment. P-7. His pay grade is Hourly Grade 5, and he operates a small bus delivering mail and passengers. Tr. 133, 137 (Edwards). By his testimony, he has driven the bus for "99%" of his time with the Company. Tr. 133 (Edwards).

2. Defendant Boeing Vertol Company is engaged in the manufacture of helicopters, rail cars, and other heavy equipment. Its manufacturing facilities are located in Delaware County, Pennsylvania.

3. Defendant Joseph Wood, Local 1069 U.A.W., is the President of Local 1069.

4. Defendant William Platt is Manager — Material Handling and Licensed Transportation of Boeing Vertol. He has been a supervisor in the Transportation Division since 1958, and he has been in charge of the Division, with the "final say" on promotion decisions, since prior to April 1, 1974. Tr. 19, 208 (Platt).

5. On November 21, 1973, Edwards filed a Charge of Discrimination with the Equal Employment Opportunity Commission. The charge (P-7) alleged that Boeing Vertol and Local 1069 discriminated against Edwards on account of his race by failing to promote him to a supervisor position in the Transportation Department. The charge did not name Platt as a respondent or otherwise complain against Platt, and Platt had no knowledge that Edwards had filed the charge until after this suit was filed. Tr. 211 (Platt).

6. Edwards was a member of the plaintiff classes certified in *Mamie Croker, et al. v. The Boeing Company (Vertol Division), et al.*, Civil Action No. 71-2168, United States District Court for the Eastern District of Pennsylvania, a suit brought pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§1981, 1985 (1976) alleging racial discrimination against Blacks in all phases of employment, including promotions to "leadman" and Supervisor positions. Boeing Vertol and Local 1069 were parties in *Crocker*, but Platt was not. Edwards was not a named plaintiff in *Croker*, nor did he ever intervene.

7. Edwards testified in *Croker* on three occasions. On two of those occasions, July 14, 1975 and October 2, 1975, he testified in support of both his individual claims and the class claims. Croker transcripts, Exhibit E to *Motion for Summary Judgment on Behalf of Defendants Boeing Vertol Company and William Platt*, (docket entry #29, filed March 22, 1982); see *Croker* pleadings attached as exhibits to the *Reply Memorandum in Support of Motion for Summary Judgment on Behalf of Defendants Boeing Vertol Company and William Platt* (docket

entry #39, filed April 5, 1982) specifically discussed at pp. 3-5 and nn. 1-5 of that Memorandum. Edwards' employment records were introduced into evidence. The *Croker* plaintiffs offered Edwards' testimony in an attempt to prove class claims of discrimination. *Id.* They specifically sought to prove that the 1975 promotion of George W. Eccleston (Caucasian) to Supervisor, the 1975 reinstatement of John H. Brighton (Caucasian) as Supervisor, and the non-selection of Edwards for those positions, were the result of a pattern and practice of racial discrimination in the selection of supervisors. The *Croker* court considered evidence of alleged discrimination in the Eccleston and Brighton decisions and weighed the credibility of that evidence in deciding the classwide claims of discrimination. 437 F.Supp. at 1177, 1183, 1191, 1192.

8. On August 4, 1975, Edwards supplemented his 1973 EEOC charge to allege that Boeing Vertol had retaliated against him when it selected Eccleston and Brighton instead of him to fill 1975 supervisor slots. P-7.

9. On June 20, 1977, the *Croker* court entered judgment in favor of Boeing Vertol and against the class on all class claims. In reaching its conclusion that the class claim had not been proven, the Court considered the evidence of alleged discrimination against Edwards. 437 F.Supp. at 1192 and entered judgment in favor of Boeing Vertol and against Edwards "on all individual claims of discrimination presented by individual plaintiff[] . . . John Edwards . . . under 42 U.S.C. §2000e *et seq.*, 1981 and 1985." The Court of Appeals affirmed the dismissal of the class claims, holding, *inter alia*, that Boeing Vertol had not engaged in any classwide discrimination in leadman designations or in promotion to Supervisor. *Croker v. The Boeing Co. (Vertol Division)*, 662 F.2d 975, 994-95 (3d Cir. 1981). The Court of Appeals declined to review the merits of the judgment against Edwards individually because Edwards was not a named plaintiff and he had failed to intervene. *Id.* at 998 n.12.

10. On November 19, 1980, the EEOC found that there was no reasonable cause to believe that Edwards' charge was true. P-21.

11. The lawsuit was filed on December 24, 1980 alleging violations of Title VII in denial of promotion to Supervisor or designation as leadman in the Transportation Division, and demanding differential backpay from 1965 to date. Prior to trial, the Court granted leave to amend the Complaint to allege a cause of action pursuant to 42 U.S.C. §1981 (1976), but plaintiff failed to formally serve such an amended complaint until three weeks after trial. Affidavit of John M. Coleman, filed May 21, 1982. However, on the first day of trial, April 5, 1982, defendants' counsel was aware the court had authorized the filing of the amended complaint.

SUPERVISOR POSITIONS

12. For substantially all of his tenure at Boeing Vertol, Edwards' preferred assignment in Boeing Vertol's Transportation Division has consisted of driving a small bus on a scheduled route. Tr. 133 (Edwards). He is assigned to "over the road" operations rather than to the "in-plant" aspect of Transportation. Tr. 213-214 (Platt). He has never sought another position. Tr. 212 (Platt). He has never told Mr. Platt that he would like to become a Supervisor, and he never mentioned it to his own immediate supervisor (Mr. Ambrose) until long after the promotion decision which he attacks in this case. Tr. 211-212 (Platt); 252-253 (Ambrose).

13. Edwards has repeatedly been given the opportunity to bid for promotion to an Hourly Grade 7 position, but he chose not to do so. Tr. 252 (Ambrose), 131-132 (Edwards). None of the people who were offered supervisory positions had previously declined an offer or promotion. Tr. 80 (Platt).

14. If Edwards had sought the promotion to Hourly Grade 7, the Company would have assisted him to qualify for it on company time. Tr. 169 (Benson).

15. The criterion for filling supervisory vacancies in the Transportation Division is merit in the sense of leadership ability; "demonstrated . . . ability and desire to take the lead;" "leadership ability and [a] take-charge attitude." Tr. 66, 232, 234 (Platt). Persons who have assumed supervisory responsibility and performed it well are strongly preferred to those who have not, but there is no absolute requirement of prior experience in the position of Supervisor. Tr. 66, 71-73 (Platt). In fact, in 1974 and 1975, the Company offered Supervisor positions to two Black persons (Ambrose and Neal) neither of whom had previously held the position of Supervisor. Both of those persons had assumed *de facto* supervisory responsibility. Tr. 68 (Platt); 251 (Ambrose).

16. The position of Transportation Dispatcher is not in the bargaining unit and selection for that position is therefore not based upon seniority. Dispatcher is an intermediate position between a bargaining unit position (such as bus driver) and management. The Dispatcher is responsible for receiving requests for transportation services and dispatching Division vehicles used to transport materials and personnel. Dispatcher is an excellent position in which to develop leadership skills. The Dispatcher had considerable administrative responsibilities with respect to reports; and the Dispatcher, like the Supervisor, is often called upon to set priorities and solve problems with limited resources. Also, the Dispatcher frequently substitutes for the Supervisor, particularly on the second shift. Tr. 68, 208-209, 216 (Platt).

17. On April 1, 1974, Boeing Vertol promoted Leroy B. Ambrose, a black tractor-trailer operator (Hourly Grade 7), to Supervisor in Transportation. Ambrose had served with distinction as the Transportation Dispatcher from December 1967 to March 1970. D-1. Edwards had known of the 1967 Dispatcher opening, but he failed to apply. Tr. 142-143 (Edwards). He claims that the reason he did not apply was that Ambrose was senior to him, but Dispatcher is not a union job (Tr. 138:24-25 [Ed-

wards] and seniority is not a criterion for promotion to Dispatcher. Tr. 92, 145:18-24, 149 (Edwards).

18. Edwards conceded that Ambrose was entitled to the 1974 Supervisor promotion in preference to him. Tr. 136. Edwards specifically referred to Ambrose's experience as Dispatcher. Tr. 134. The selection of Ambrose over Edwards and other candidates was not based upon Edwards' race or upon the fact that Edwards had filed a Charge of Discrimination.

19. Also in April, 1974, as a result of expansion of responsibilities of the Transportation Division, the Division was authorized to fill the Transportation Dispatcher position in general salary grade 5. Tr. 262:12-18 (Thomas). The Company publicly posted a notice announcing the availability of the position. Tr. 136 (Edwards). Edwards, who was in Hourly Grade 5 (Tr. 137 [Edwards), again failed to apply. Although Edwards claims that he would have suffered a pay cut if he had applied, his testimony on this point was not credible. Tr. 139-140. Also, the Company fully rebutted it by showing that as a general salaried position, the Dispatcher position has a range of possible salaries instead of one fixed rate, that the move to Dispatcher would have been a promotion for Edwards, and that it is contrary to Company policy to have a pay decrease upon promotion. Tr. 264:12-17 (Thomas); 139-2-4 (Edwards). Moreover, in 1974, the Dispatcher was eligible to receive a 4% salary supplement that was not then available to hourly employees such as Edwards. Tr. 262-263 (Thomas); 140 (Edwards).

20. The Company hired George W. Eccleston (Caucasian) to fill the 1974 Dispatcher position. Eccleston came to Boeing Vertol from a position as chief of a large transportation department for the Upper Chichester school district. Tr. 34 (Platt). Prior to that, he had worked his way up to the position of Leadman in Transportation at Boeing Vertol. Tr. 33-34 (Platt).

21. In March, 1975, Boeing Vertol reclassified

Charles McNulty (Caucasian) from supervisor of rail car transportation in another Division (Surface Transportation Systems) to supervisor of rail car transportation in the Transportation Division. McNulty did not fill a vacancy. He was reclassified when, and because, the rail car transportation responsibilities were shifted into the Transportation Division. Tr. 212-213 (Platt).

22. In July, 1975, Boeing Vertol had a need for two additional supervisors in the Transportation Division.

23. Edwards' repeated failure to apply for the position of Dispatcher and his continuing rejection of opportunities for promotion to Hourly Grade 7 demonstrated that Edwards was not interested in becoming a Supervisor.

24. The Company first offered one of the 1975 Supervisor positions to Lawrence M. Neal (Black), a driver who had been essentially running the second shift without supervision, but Neal declined. Tr. 71-72 (Platt); 251 (Ambrose).

25. The two supervisor positions were then offered to and accepted by Eccleston and by John H. Brighton (Caucasian, now deceased). Brighton had previously served as Supervisor in the Transportation Division and he had been downgraded from the Supervisor position solely as a result of a reduction in force. Tr. 214 (Platt). Eccleston had been performing substantially all of the functions of a Supervisor in his capacity as Dispatcher on the second shift with little or no supervision, and his supervisory performance and leadership qualities were outstanding. D-2; Tr. 216 (Platt).

26. Edwards never demonstrated supervisory ability on the job. His supervisors, both Black and Caucasian, concluded that he was not qualified for the position of Supervisor. Tr. 210-211, 214-15, 217 (Platt); 25253 (Ambrose).

27. The offer of the position to Neal, the selection of Eccleston for promotion to Supervisor, and the selection of Brighton to resume the responsibilities of Supervisor

were made by Platt, Ambrose, and McNulty. Tr. 214 (Platt). No consideration was given to the fact that Edwards had filed a Charge of Discrimination or to the fact that Edwards had testified against the Company in *Croker*. Tr. 215, 218 (Platt); 251-252 (Ambrose).

28. The offer of the position to Neal and the selections of Brighton and Eccleston instead of Edwards and other candidates were not based upon Edwards' race, or upon the fact that Edwards had filed a Charge of Discrimination, or upon the fact that Edwards had testified against the Company in the *Croker* case. Tr. 215, 218 (Platt); 351-252 (Ambrose).

29. There have been no Supervisor designations in Transportation since 1975.

LEADMAN DESIGNATION

30. A leadman is an employee within one of the usual job classification who is paid an additional ten or fifteen cents per hour to perform some extra duties. Supervisors exercise their own discretion in selecting leadmen, and seniority is not a factor. The ordinary practice is not to make "over-the-road" employees leadmen in the "in-plant" operation, and vice versa. Tr. 270 (Edwards); 252 (Ambrose). A leadman must know how to operate all equipment in his department. Tr. 220-221 (Platt).

31. James S. Reid (Black) served as a leadman in the in-plant operation until his death in 1973 or 1974. Tr. 224. (Platt). Thomas H. McCabe (Caucasian) served as a leadman in the in-plant operation in the early 1970's until that position was abolished soley because of reduction in force (D-3); Tr 218-219 [Platt]); and again from July 16, 1979 to the present.

32. Edwards was not qualified for the 1979 leadman designation because he did not work in the pertinent department and he did not know how to operate

the equipment in that department. Tr. 220-221, 223 (Platt); 252 (Ambrose).

33. In the 1979 leadman designation, no consideration was given to Edwards' race, or to the fact that Edwards had unsuccessfully testified against the Company in *Croker* four years before. Tr. 223-224 (Platt).

34. In 1979, McCabe was the best qualified person for designation as leadman in the in-plant operation. In addition to having an excellent prior record of actual experience as leadman in the in-plant operation (D-4), he was familiar with all of the equipment in the in-plant operation and knew how to operate it. Tr. 221 (Platt).

INTENT

35. Edwards' race and his complaints of discrimination were not factors, intentionally or unintentionally, in any of the employment decisions challenged in this case.[1] Tr. 215, 218, 223-224 (Platt); 251-252 (Ambrose).

36. There was no discrimination against the plaintiff as an individual and there was no pattern of discrimination in the Transportation Department.

DISCUSSION

Edwards has failed to make out a case of discrimination or retaliation. Neither Edwards' race nor his complaints of discrimination played any role at all in any of the employment decisions he attacks. Edwards was not promoted because he was not qualified and because he affirmatively demonstrated lack of interest in promotion.

Edwards lacked the basic qualifications for the leadman position. And with respect to the position of Su-

---

1. Questions of intent in discrimination cases are "pure questions of facts" and should be resolved by Findings of Fact rather than by Conclusions of Law. *Pullman-Standard v. Swint*, 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982).

per isor, Ambrose and Platt, the seasoned superiors who made the decisions attacked by Edwards — and one of whom is himself Black — both testified unequivocally that in their respective opinions, Edwards (a) was not qualified to be a Supervisor and (b) had shown lack of interest in becoming one. Tr. 217-218 (Platt); 252-253 (Ambrose). Those opinions are buttressed by the objective evidence.

Moreover, with respect to the claim of retaliation, there is no casual link between adverse action and protected activity. There is no evidence that the persons who made the promotion decisions even had knowledge of Edwards' EEOC charge at the time they made the decisions. Even if there had been such evidence, that would not have sufficed to satisfy the "casual link" requirement. Edwards clearly failed to make out a case of retaliation.

Although my findings are congruent with those made by Judge Newcomer in *Croker* to the extent his findings deal with the Edwards' claims, my finding both as to historic and ultimate fact are based on the record before me totally independent of the *Croker* adjudication.

In view of my determination as to the merits of Edwards' claims, it is unnecessary for me to reach the other defenses raised by defendants such as collateral estoppel, the alleged abandonment of the 42 U.S.C. §1981 claims, the plaintiff's failure to make out a prima facie case in accordance with the rubric of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and the failure to name the defendant Platt as a respondent in the EEOC charge.

I find that plaintiff has failed to carry his burden of establishing by a preponderance of the evidence that he was discriminated against in his employment by the defendants. Indeed, the evidence convinces me to the contrary.

Accordingly, the court arrives at the following

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of the action.

2. The defendants are entitled to judgment in their favor and against the plaintiff.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John F. Edwards	:	Civil Action
v.	:	
Boeing Vertol Company, et al.	:	No. 80-4955

JUDGMENT ORDER

AND NOW, this 29th day of NOVEMBER, 1982, in accordance with the Findings of Fact and Conclusions of Law heretofore filed, it is hereby

ORDERED that JUDGMENT be and the same is hereby entered in favor of the defendants and against the plaintiff.

BY THE COURT:

JOSEPH L. MCGLYNN, JR., *J.*

Office - Supreme Court, U.S.
FILED
JAN 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-902

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOEING VERTOL COMPANY AND
WILLIAM PLATT,

Petitioners

v.

JOHN F. EDWARDS,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

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1. Did the Court of Appeals err when it held that a class member witness in a race discrimination case, neither a named plaintiff nor an intervenor, who does not challenge the class finding of no company-wide pattern and practice of discrimination, is free to bring his own individual suit, and is not bound by findings concerning him as an individual which the class court had no jurisdiction to make and the Court of Appeals previously refused to review?

2. Did the Court of Appeals err when it held that a class member witness of a F.R. Civ. P. 23(b)(2) class who filed an individual suit before final determination against the class is entitled to the tolling of the

statute of limitations from the filing of the class action?

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APPLICABLE SECTIONS OF F.R. Civ. P. 23 OMITTED BY PETITIONERS

Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

... (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request

exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. ...

COUNTERSTATEMENT OF THE CASE

John Edwards, the respondent, is a black employee with an excellent record in the Transportation Department of petitioner Boeing Vertol Company, where he has worked since 1952. In this lawsuit, he challenged the petitioners' failure to promote him because of his race and their retaliation against him for testifying against Boeing. The company allowed petitioner William Platt, manager of Boeing Vertol's Transportation Department, to exercise unfettered discretion when he appointed ten white and no black employees as supervisors over a period of fifteen years from a racially mixed candidate pool. After Mr. Edwards filed a charge of race discrimination with the E.E.O.C. in 1973, and testified against

Boeing at a class action trial in 1974, Mr. Platt named his first black supervisor, who was not Mr. Edwards.

At the time he filed his E.E.O.C. charge, Mr. Edwards was a member of a pending F.R. Civ. P. 23(b)(2) class of "all Negro persons who have been employed by Boeing Vertol" between certain dates. See Croker v. The Boeing Company (Vertol Division), 437 F. Supp. 1138 (E.D. Pa. 1977); 444 F. Supp. 890 (E.D. Pa. 1977); 23 FEP Cases 1783 (E.D. Pa. 1979); aff'd in part, 662 F.2d 975 (3rd Cir. 1981) (en banc). Mr. Edwards was neither a named plaintiff nor an intervenor in Croker, but he testified in 1974 as an individual class member.

The trial court in Croker found no company-wide pattern of race discrimination. Its discussion of its finding against the

inference of discrimination in promotions focuses entirely on company-wide statistical evidence. 437 F. Supp. at 1190-91. Crucial to the Third Circuit's affirmance of this point as "not clearly erroneous," was evidence of a Supervisory Selection Board which acted to curb the perpetuation of individual bias on a company-wide basis by recommending the appointment of blacks for 16% of the supervisory promotions. 662 F.2d at 994; 437 F. Supp. at 1151. The trial court's holding against the class explicitly did "not preclude findings of individual acts of discrimination." 437 F. Supp. at 1192. In fact, it did find individual instances of race discrimination and harassment as to four named plaintiffs and also purported to find for two class member witnesses and against Mr. Edwards and certain other witnesses. Id. at 1192-97.

On the post-verdict motion of Boeing (by counsel for petitioners in this case), the district court dismissed the successful claims of the two class member witnesses who were neither named plaintiffs nor intervenors, based on the Third Circuit holding in Dickerson v. U.S. Steel Corp., 582 F.2d 827 (3rd Cir. 1978), that trial courts have no power to decide individual claims of class member witnesses who are neither named plaintiffs nor intervenors. See Croker, 23 FEP Cases at 1788 (not reported elsewhere). The Third Circuit affirmed those dismissals in Croker on appeal, 662 F.2d at 997-98. Boeing, however, never moved to vacate the "finding" against Mr. Edwards or the other unsuccessful individual class member witnesses.

On appeal to the Third Circuit, the Croker class attorneys sought to reverse

the district court's finding against Mr. Edwards on the merits, 662 F.2d at 997, but the Third Circuit explicitly declined to reach the merits of Mr. Edwards' claim, based on the no-jurisdiction holding of Dickerson. Croker, 662 F.2d at 997-98 n.12. Thus, the trial court's findings concerning Mr. Edwards' individual claim were treated by the Third Circuit as if they had never been rendered.

In this present case, which Mr. Edwards filed in 1980 (before the Third Circuit decision in Croker) to vindicate his individual claim, Boeing filed a motion for summary judgment shortly before the 1982 trial, raising res judicata and collateral estoppel. The Edwards district court held those motions pending trial, and when after trial it found against Mr. Edwards on the merits during the period from 1973 forward, the court found it "unnecessary ... to reach"

the defenses of res judicata and collateral estoppel for that period. A-23.

The Edwards district court further ruled, in keeping with an earlier order denying discovery of facts covered by the Croker limitations period but predating the filing of Mr. Edwards' E.E.O.C. charge, that Mr. Edwards was foreclosed from attempting to prove that he was discriminated against between 1965 and 1973. The district court's ruling was based on a combination of the view that Mr. Edwards was not entitled to the benefit of the Croker limitations period, and that the Croker case settled any discrimination issues based on facts occurring between 1965 and 1973. Appendix in the Court of Appeals, A244-257 (Transcript April 5, 1982). Thus, the facts of Mr. Edwards' case, whether viewed as background evidence or as the basis for relief, have not yet been fully stated on the record.

In its decision below, the Third Circuit recognized that Mr. Edwards has not sought to relitigate whether Boeing Vertol engaged in a company-wide pattern or practice of race discrimination, the issue decided in Croker. A-12, Edwards v. Boeing Vertol Co., 717 F.2d 761, 767 (1983). In this case, Mr. Edwards has sought only to prove that he, individually, was discriminated and retaliated against by Boeing Vertol through Mr. Platt, the manager of the Transportation Department, where the practice was different from the company-wide practice for choosing employees for promotion. The Supervisory Selection Board -- the existence of which was crucial to the finding of no company-wide discrimination -- did not operate to review decisions in promotions in the Transportation Department, where Mr. Edwards is and has been employed. In his department, the company did not prevent subjective

decision-making by Mr. Platt. In Croker, where the focus of the class attorneys was on the interest of the class and not individuals, they did not present statistics analyzing the Transportation Department separately from the rest of Boeing.

In ruling on Mr. Edwards' appeal, the Third Circuit recognized that res judicata does not bar Mr. Edwards' individual, atypical claims. In addition, since the Third Circuit had earlier refused to review the individual "findings" of the Croker court which had no power to make them, it rejected the collateral estoppel contention of petitioners because there was no "opportunity for appellate review." A-13, 717 F.2d at 767.

The Third Circuit granted a new trial to Mr. Edwards on two grounds. First, the

court held that the district court erroneously limited discovery and proof to acts of discrimination occurring after May 25, 1973, 180 days before he filed his individual charge with the E.E.O.C. The Third Circuit held that Mr. Edwards was entitled to a tolling of the statute of limitations based on the class action filing until a final adversary determination of the class claims rendered on September 30, 1981. Since Mr. Edwards filed his complaint in court on December 24, 1980, while the class action was pending in Croker, the Third Circuit held that he had a right to discovery and proof under Title VII back to March 23, 1968, and under §1981 back to September 2, 1965. Second, the Third Circuit held that Mr. Edwards was entitled to a jury trial, since he did not waive one when he filed a pro se complaint before he was represented by counsel, a holding not contended by

petitioners to merit plenary review by this Court. Petition at 8 n.6.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Petitioners' Question No. 1, Because Respondent Did Not Challenge Any Finding "Necessary To The Disposition Of A Classwide Claim Of A Pattern And Practice Of Discrimination"

Petitioners' entire argument that the holdings of the Court below on res judicata and collateral estoppel merit this Court's review rests on the false factual premise that the Croker trial court's "findings" about Mr. Edwards were "necessary" to its determination of the class claims in that case. Petition at 7, 9. In fact, however, when the Croker court denied the class claim of a company-wide pattern and practice of race discrimination, it did not rely on Mr. Edwards' individual facts at all. The

district court in Croker explicitly held, as affirmed by the Third Circuit, that its finding against the class did not preclude findings of individual instances of racial discrimination. Indeed, the fact that the district court found both for and against various individuals independently of the class claims vitiates any argument that those findings were "necessary" or even related to the claims of the class as a whole.

Although the class attorneys did present Mr. Edwards' testimony in an attempt to bolster the class claim, the trial court never relied on Mr. Edwards' testimony in its finding against the class. Mr. Edwards' testimony in Croker related only to the issue of discrimination against him in promotions to supervision in his department. The Croker court's discussion of its ruling against the

class on the promotion issue focused not on Mr. Edwards, but on the insufficiency of the plaintiffs' statistical evidence as rebutted by Boeing Vertol. 437 F. Supp. at 1190-91. Although the court mentioned in general discussion that it considered the illustrative individual situations and the evidence of individual class members, id. at 1177, 1192, nothing related to Mr. Edwards' testimony formed the basis of its conclusion concerning discrimination against the class. The trial court in Croker discussed Mr. Edwards solely under the heading "Individual Plaintiffs" (which Mr. Edwards was not), id. at 1166, 1176, and "Individual Claims," id. at 1192, 1197. No "finding or conclusion" of the Croker court as to Mr. Edwards individually was necessary to its class action holding. Thus, petitioners' res judicata and collateral estoppel arguments

are without factual foundation, and need not be addressed on review by this Court.

II. Even Affirmance By This Court In Cooper Would Not Bar Mr. Edwards' Individual Claim, Because He Is Not Contesting Any Finding Or Holding Of The Court Below Which Is Res Judicata

A second reason for denying the writ is that this case is not governed, as petitioners say, by the outcome of E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir.), cert. granted sub nom. Cooper v. Federal Reserve Bank of Richmond, No. 83-185, 52 U.S.L.W. 3342 (U.S. October 31, 1983) ("Cooper"). Even an affirmance by this Court of Cooper would not require a change in this case. In Cooper the Fourth Circuit held that there was "no discrimination," 698 F.2d at 674, while the Croker court explicitly held that its decision in favor of the employer

on the class issue was not a determination that individual employees had not been victims of discrimination. 437 F. Supp. at 1192. That is all that was affirmed by the Third Circuit in Croker, 662 F.2d at 997. Therefore, no holding in Croker is res judicata to Mr. Edwards' individual claims.

Thus, even if Cooper is affirmed, it cannot stand for the proposition, as petitioners argue in their brief, that every single atypical claim is barred, when the trial court expressly denied any intent to accomplish that result. Because of the factual independence of this case from Cooper, there is no cause to hear the two matters in tandem.

III. No Collateral Estoppel Issue Is Appropriately Before This Court, Because The Trial Court In Croker Had No Power To Find Against Mr. Edwards Individually; Since Those Findings Were A Nullity, The Third Circuit Never Reviewed Them On Appeal

Petitioners further argue that this case should be taken up as a companion to or substitute for Cooper because it supposedly offers an opportunity to decide issues of collateral estoppel as well as res judicata. However, there is in fact no collateral estoppel issue here.

Collateral estoppel applies only to findings as to parties or those who have actual control over the litigation. Montana v. U.S., 440 U.S. 147, 154 (1979). In this case, where the Croker court had no jurisdiction over Mr. Edwards as an individual claimant, and where no claim could possibly

be made that he directed the class case, the findings on his individual situation cannot estop his later claim. The trial court in Croker had no jurisdiction to make individual findings binding on Mr. Edwards, because he was not before it as a party. He was merely a class member witness, not a named plaintiff or an intervenor.

In addition, where Mr. Edwards could not obtain review of his claim in the Court of Appeals in Croker because of that court's conclusion that the Croker trial court had no power to make the findings, Mr. Edwards cannot be estopped from litigating his claim in a forum where he is represented by his own counsel, and where he has his first full and fair opportunity to proceed with both trial and appeal on his individual claim. See Restatement (2d) of Judgments, §28(1), (3), Comments a & h (1982).

Petitioners repeatedly characterize the Court of Appeals' conclusion that Mr. Edwards is not collaterally estopped as to his individual claim as based on a "sua sponte assertion," that Mr. Edwards had no "opportunity for appellate review" by the writer of the Third Circuit opinion, Petition at 8. However, this "assertion" on behalf of a unanimous panel comes from the published opinion of the Third Circuit in Croker v. The Boeing Company, 662 F.2d at 998 n.12. The Croker appellate court refused to reach the merits of the trial court's findings in Croker relating to Mr. Edwards, although the class attorneys had attempted to appeal those findings for him. Thus, he could not obtain appellate review of those findings on the merits.

Petitioners' argument appears to imply that Mr. Edwards had an "opportunity" because

he could have intervened and because the class attorneys did seek review. However, where those findings were made outside of the trial court's power in Croker, intervening for appeal would have achieved no different result, because the findings without jurisdiction were a nullity. The appellate court's refusal to consider them on the merits where the class attorneys had specifically sought reversal demonstrates this conclusively.

Indeed, where no petition for certiorari was filed in Croker, the judgment of the Third Circuit that the findings against Mr. Edwards were a nullity and not reviewable is a final judgment that is "law of the case" and res judicata. Boeing cannot now be heard to challenge whether or not Croker and Dickerson were "correctly decided." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981).

Moreover, the Third Circuit's resolution of the collateral estoppel question in Edwards is entirely consistent with this Court's treatment of related questions. The Third Circuit's approach avoids the danger of serious constitutional due process problems inherent in petitioners' proposal to bind individual class members like Mr. Edwards with factual and legal interests atypical of the class. See Hansberry v. Lee, 311 U.S. 32 (1940), where this Court long ago held that binding unrepresented parties with differing interests offends due process. In American Pipe & Construction Co. v. Utah, 414 U.S. 538, 549 (1974), this Court read F.R. Civ. P. 23 to offer class members the choice of becoming "either non-parties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or ... full members who must abide by the final

judgment, whether favorable or adverse."[1] In contrast petitioners propose to render class actions a "one-way-street" for defendants. Petition at 9. The same counsel for Boeing argued successfully in Croker that individuals who had proved individual claims against them in the class action but were not named parties could not recover as individuals when they had not intervened in the class action. Croker, 23 FEP at 1788, aff'd,662 F.2d at 997-98. Now, however, they want Mr. Edwards to be individually bound, when he could not recover or obtain review because of his non-party status.

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[1] In contrast to the Cooper petitioners and the F.R. Civ. P. 23(b)(3) and (c)(2) class members discussed in American Pipe,who are provided a notice informing them of their right to opt in or out of the class, Mr. Edwards was a member of a (b)(2) class. While he was aware of the class action as a witness, he was never notified by the court that he would have to opt out of the class case or be bound, even as to his individual claim, separate from the class.

Additionally, if the petitioners' position were to prevail, a class member with no opportunity to recover on his individual case would risk preclusion of his claim if he testified as a witness. The class member in Mr. Edwards' position would thus have little to gain and much to lose from offering his testimony. This Court, in a unanimous opinion authored by the Chief Justice, has cautioned against the judicial formulation of any rule that would risk such discouragement of witnesses from testifying. See Bronston v. United States, 409 U.S. 352, 359 (1973). Such a rule would have damaging ramifications throughout the litigation process. To cite but one example, a witness called upon to testify to a criminal defendant's prior similar acts under F.R.E. 404(b) could lose the opportunity to sue the victimizer if his or her testimony were discredited by the court.

In summary, collateral estoppel is not an issue in this case, and cannot be used as the basis for an argument that Edwards should be taken up with Cooper. However, even if this Court does view the collateral estoppel issue as one which might be raised by the facts of this case, certiorari at this stage would be inappropriate in light of the incomplete record occasioned by the district court's order denying pre-1973 discovery, and the necessity of remand for a jury trial based on a full factual presentation.

IV. Petitioners' Claim Of Conflict In The Circuits On The Statute Of Limitations Issue Is Spurious, Because The D.C. Circuit Footnote Relied On By Petitioners Antedates This Court's Most Recent Guidance In The June 1983 Decision In Crown, Cork & Seal v. Parker

Petitioners argue that certiorari should be granted in this case because of a claimed conflict between the Third Circuit's decision below and the D.C. Circuit decision in Wachovia Bank and Trust Co. v. Nat'l Student Marketing Corp., 461 F. Supp. 999 (D.C. 1978), aff'd in pertinent part, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981). In fact, however, no such conflict exists.

The panel below relied on the most recent teaching of this Court in holding that Mr. Edwards, as a class member in the Croker case, was entitled to the benefits of the tolling of the statute of limitations until the final adverse determination of

the class claim, based on Crown,Cork & Seal Co. v. Parker, 462 U.S. , 103 S. Ct. 2392, 76 L. Ed.2d 628 (1983). Wachovia Bank, by contrast, predates the Crown Cork decision, and does not present a currently reliable contrast to the holding of Edwards v. Boeing. Crown,Cork removes an analytical underpinning of Wachovia, and renders petitioners' claim of a conflict in the Circuits at best premature, as is more fully described below.

Both the district court and the Court of Appeals in Wachovia based their denial of the tolling of the statute of limitations in part on those plaintiffs' failure to intervene. Crown,Cork made clear that intervention is not a requirement for the tolling of the statute of limitations but that a class member may file his own individual suit in order to claim tolling after the class action has been determined inappropriate. It

cannot be said that the District of Columbia Circuit would now decide Wachovia identically to its passing reference in 650 F.2d at 346 n.7, had it had the benefit of this Court's opinion in Crown, Cork & Seal Co. v. Parker. Thus, the purported "conflict" between the Third and D.C. Circuits is at best only speculation.

V. This Case Is Unusual, Unimportant To Anyone But The Parties, And Does Not Merit This Court's Review

Mr. Edwards' case is an unusual one in that he believed that he was a typical class member throughout the pendency of the Croker case. Only when the classwide claim failed in part because of company-wide statistics and because of the Supervisory Selection Board (which operated to curb individual subjective bias against minorities in the achievement of 16% black supervisory pro-

motions company-wide) did it become apparent that Mr. Edwards' claim of discrimination in promotion in the Transportation Department was atypical of the claims of the class. Mr. Platt, manager of the Transportation Department, in the ten supervisory promotions of white males he made over a fifteen year period, bypassed the unquestionably qualified Mr. Edwards, without input or control from the Supervisory Selection Board.

Although the district court in Croker certified an across-the-board class of employees discriminated against because of race, a certification prior to and perhaps questionable in light of General Telephone Co. v. Falcon, 457 U.S. 147 (1982), Mr. Edwards' situation is analagous not to the Cooper plaintiffs', but to that of the class members in Crown,Cork, 76 L.Ed.2d at 632, where class certification was denied by the district

court because of atypicality. The decision against the class on the merits in Croker revealed that the named plaintiffs who made an across-the-board claim could not represent Mr. Edwards' individual claim because the unique practice of Mr. Platt in the Transportation Department differed from company-wide practice. There is no functional or analytical reason why Mr. Edwards as a member of a certified class could not rely on that certification to toll his claims until the decision was made that class claims were denied in the Croker case on grounds which rendered his claim atypical. Respondent submits that such circumstances will be unusual in the future, in that most supporting witnesses in properly certified post-Falcon class actions will in fact be complaining of the same discrimination being challenged by the class, or will realize earlier the necessity of filing a separate suit under the principles of Falcon.

Petitioners contend that a rule permitting atypical individuals to sue separately would irreparably prejudice them. However, in Mr. Edwards' case, the record reflects that because Mr. Edwards participated as a witness, and did not "sleep on his rights," petitioners are uniquely aware in his case "not only of the substance of the claims being brought against them but also of the name and generic identities of the potential plaintiffs," American Pipe, supra, 414 U.S. at 555, and in addition of the "evidence, memories, and witnesses." Crown, Cork, supra, 76 L.Ed.2d at 637 (concurrence). Indeed, at the truncated trial allowed Mr. Edwards in this case, respondents had the transcribed testimony of Mr. Platt in the Croker case available when his memory of prior events failed him. The fact that another witness died in 1975, after Mr. Edwards filed his individual charge with E.E.O.C. in 1973, does not relate to the tolling of the statute

of limitations prior to 1973 which is presented to the Court in this case. In any event, the petitioners' claimed issue of prejudice has neither been established on the record nor fully litigated or argued by both sides before any trial court.

The rule proposed by petitioners to limit the tolling of the statute of limitations to class members in cases where the class is decertified as in Crown,Cork & Seal will not result in uniform fairness to defendants. The timing of class decertification may indeed be as late in a case as a finding against the class on the merits because of lack of a company-wide pattern or because of atypicality. In General Telephone v. Falcon, supra, this Court stressed the "inherently tentative" nature of a class certification until the trial court has sufficient evidence to make a "rigorous analysis, that the prerequisites of Rule 23(a)

have been satisfied." 457 U.S. at 160, quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978). In cases like Croker, this may occur eight years or more after the original filing of the complaint.

Thus, defendants do not lose any significant protection of the tolling rule if it is interpreted to include class members whose individual claims emerge as atypical based on trial facts along with those whose classes are decertified for atypicality after extensive pretrial discovery. The alternative interpretation, by contrast, would harm the court system, in that it would require class counsel to move for protective intervention by any possibly atypical class members. Class actions would become unnecessarily complex or top-heavy, filled with intervenors, and the risk of decertification would increase. The inevitable result would be a multiplicity of individual

actions filed. This would negate any economy which Congress intended in Rule 23, and would conflict directly with the holding of American Pipe that the purpose of the Rule was to prevent protective interventions and encourage class action efficiency. 414 U.S. at 551.

Thus, not only do the petitioners ask this Court to establish a bad rule, they do so in an inappropriate case.

CONCLUSION

The petition for a writ of certiorari should be denied. The res judicata and collateral estoppel issues raised by petitioners in Question 1, are not presented in this case. Mr. Edwards as an atypical class member does not seek in his individual suit to challenge the class holding or any findings "necessary" to it, and the Court of

Appeals recognized that he had no opportunity for review of the individual findings which the class court had no power to make. Petitioners' Question 2 regarding the tolling of the statute of limitations for a class member does not merit this Court's review, because the Court of Appeals decided it consistently with this Court's teaching on the policies of class action rules only last Term in Crown, Cork & Seal Co. v. Parker. Mr. Edwards' case is unusual and not controlled by a decision in Cooper v. Federal Reserve Bank of Richmond, No. 83-185. This Court should deny the petition for certiorari and allow Mr. Edwards the first trial which will give him a full opportunity to present his individual claim of race discrimination.

Respectfully submitted,

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No. 83-902

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOEING VERTOL COMPANY AND
WILLIAM PLATT,

Petitioners

v.

JOHN F. EDWARDS,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent's Brief in Opposition deals primarily with the merits and fails to present grounds why the case should not be reviewed by this Court. That is not surprising; the Court has frequently indicated that questions of *res judicata* and limitation periods in class actions are matters of considerable importance to the judicial system. However, this Reply Brief may be helpful to the Court because respondent Edwards' argument with respect to the first issue presented in the Petition for Certiorari (*res judicata* and collateral estoppel) hinges on misstatements of the record.

The Class Action Court In *Croker v. Boeing* Had Jurisdiction To Make Findings And Conclusions With Respect To Respondent's Testimony Because That Testimony

Was Indisputably Considered In Order To Decide The Class Claims

In the first place, Edwards represents that there is reason to question the jurisdiction of the class action court to make findings and conclusions referring to him. He concedes that he was a member of the certified class in *Croker v. Boeing*, that his individual situation was presented to the class action court as an "illustrative individual situation of discrimination," that the *Croker* court entered specific findings of fact and conclusions of law with regard to that evidence, and that the *Croker* court held that "any inference of discrimination" had been rebutted as to the particular employment decisions he attacks. Edwards nevertheless asserts that the *Croker* court lacked the power to make those findings and conclusions because he was not a named plaintiff or an intervenor[1] and because, he says, "when the *Croker* court denied the class claim of a company-wide pattern or practice of race discrimination, it did not rely on Mr. Edwards' individual facts at all."[2]

In fact, however, there are explicit findings of fact in the present case, which were not appealed, not only that "The *Croker* plaintiffs offered Edwards' testimony in an attempt to prove class claims of discrimination,"[3] but also that "*In reaching its conclusion that the class claim had not been proven, the Court considered the evidence of alleged discrimination against Edwards*,"[4] and even that "[t]he *Croker* court considered evidence of alleged discrimination in the Eccleston and Brighton decisions [i.e., the specific promotion decisions challenged by Edwards] and *weighed the credibility of that evidence in deciding the classwide claims of discrimination*."[5]

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1. Respondent's Brief in Opposition, at 17.
2. *Id.* at 11 and 13.
3. App. to Pet. for Cert., A-16, ¶7.
4. *Id.*, ¶9 (emphasis supplied).
5. *Id.*, ¶7 (emphasis supplied).

The subject of whether or to what extent the *Croker* court had jurisdiction to award relief to Edwards individually is beside the point. There has never been the slightest doubt or dispute that the *Croker* court had jurisdiction to enter findings of fact and conclusions of law on all evidence presented to it *with respect to the class claims*. Edwards has consistently admitted that.[6] And in this case Boeing Vertol relies on exactly those findings and conclusions with respect to Edwards that were entered, according to the unchallenged findings of fact in the present case, "[i]n reaching [the] decision that the class claim had not been proven".

Accordingly, there is no foundation for Edwards' assertion that the *Croker v. Boeing* court lacked the power to make the findings and conclusions which it entered with respect to Edwards' "illustrative individual situation."

Edwards' closely related assertion that the findings and conclusions with respect to him were not allowed appellate review is similarly incorrect. In fact, it is a matter of record that the class plaintiffs attempted to persuade the Court of Appeals in the class action case to set aside the findings and conclusions with respect to Edwards for purposes of the class claims and that none of those findings and conclusions were disturbed.[7]

It Has Never Been Determined That Respondent's Claims Were Atypical Of The Class Claims, And The Third Circuit Erroneously Treated The Question Of Typicality As Immaterial

The remaining premise of Edwards' opposition to a grant on the first issue presented in the Petition for Certiorari is the representation that Edwards' claims are

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6. *E.g.*, Respondent's Brief in Opposition, at 3, 12.
7. *E.g.*, Tr. of CA Oral Arg., at 24; 662 F.2d at 993-95.

atypical of the class claims. Edwards repeatedly conveys to this Court the impression that it is a holding or even an undisputed fact of record that his claims are atypical.[8] That premise is crucial to Edwards' arguments that he should not be bound by the findings, the conclusions, and the judgment in the class action case.

In fact, however, the supposed "atypicality" is nothing but a highly dubious assertion,[9] and Edwards raised it for the first time on appeal in this case.[10] The District Court has never been given a chance to consider whether Edwards' claims is or is not atypical. And that is exactly one reason why this case is so appropriate for certiorari. The Court of Appeals, without even purporting to hold that Edwards had been denied adequate representation by the class representatives, held that *res judicata* and collateral estoppel could not be available to Boeing Vertol.

Boeing Vertol's position on the merits of Issue #1 in this case is that class members in properly certified class actions are bound by the findings and conclusions of the class action court *absent* inadequate notice or inadequate representation. Judging by Edwards' belated emphasis upon assertions of atypicality, he may now concede that the rule suggested by Boeing Vertol is correct. But the problem is that the Third Circuit emphatically

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8. *See, e.g.*, Respondent's Brief in Opposition, at 7-8, 20.

9. Directly contrary to Edwards' representations in this Court (Respondent's Brief in Opposition, at 7), the *Croker* class action court specifically and expressly considered promotions to supervision in Edwards' own Transportation Department. The class representatives presented testimony of several witnesses, including Edwards and one Banks, and other evidence including departmental employment records, on the subject. *E.g.*, 437 F. Supp. at 1176.

10. During the entire period the class action case was pending, Edwards never asserted that his claims were atypical or that he had not been adequately represented by the class representatives. In fact, the class action court made specific findings on typicality when it certified the class in 1972, and that determination became final long before the present case came to trial in 1982.

rejected Boeing Vertol's position and issued a holding on *res judicata* and collateral estoppel which directly conflicts with that of the Fourth Circuit in *Cooper v. Federal Reserve Bank of Richmond*. In part precisely because the Third Circuit treated typicality as immaterial, Issue #1 is especially clear in this case.

In this case but not in *Cooper*, this Court has the opportunity to consider not only the *res judicata* effect of the judgment against the class, but also the collateral estoppel effect of the findings and conclusions entered to reach the judgment. And in this case, unlike *Cooper*,[11] there has never been any claim that the employer waived the defenses of *res judicata* and collateral estoppel. *Cooper* and this case therefore present the classic situation for "straight-lined" consolidation.

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11. See Part II(2) of the Brief for Petitioners on the merits, *Cooper v. Federal Reserve Bank of Richmond*, No. 83-185 (U.S. filed Dec. 12, 1983).

CONCLUSION

The petition for certiorari should be granted and the case should be consolidated for argument in tandem with No. 83-185, *Cooper v. Federal Reserve Bank of Richmond*, or substituted for *Cooper*.

Respectfully submitted,

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